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No. 84-713

In the Supreme Court of the United States

OCTOBER TERM, 1984

DISTRICT LODGE NO. 166, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,

Petitioner,

vs.

TWA SERVICES, INC.; NATIONAL AERONAUTICS AND SPACE ADMINISTRATION; and RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the Union have standing to seek to recover Service Contract Act wages and benefits from TWA Services?

2. Did Congress create a private cause of action under the Service Contract Act?

3. Does the Union have an action against TWA Services under Section 301 of the Labor Management Relations Act (29 U.S.C. §185) when it has been found that TWA Services did not violate any specific terms of the agreement?

4. Should the Supreme Court exercise its discretionary jurisdiction to supervise the lower courts when (a) the underlying decision is consistent with that of other circuit and district courts and (b) the only true remaining issue is the remedy?

PARTIES INVOLVED

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

***Principally relied upon.**

Statutes and Congressional Material:

Regulations:

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I.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals is reported at 731 F.2d 711 (11th Cir. 1984) (Petitioner's Appendix at pages 1a through 14a). The Opinions and Judgments of the District Court for the Middle District of Florida are not officially reported. They are found at pages 18a through 39a of the Petitioner's Appendix.

II.

STATUTE AND REGULATIONS

This case involves the interpretation and application of the Service Contract Act, 41 U.S.C. §351 *et seq.* and the Department of Labor Rules and Regulations under the Service Contract Act, 29 C.F.R. Part 4.

III.

STATEMENT OF CASE

The government contract which eventually led to the instant litigation was originally awarded to TWA Services (TWAS) by the National Aeronautics and Space Administration (NASA) under a concession agreement in 1968. Under that agreement TWAS operates the Visitor Information Center (VIC) at the Kennedy Space Center (KSC) facility. In November 1978, the concession agreement was modified and TWAS was required by NASA to perform the landscaping function at the VIC. A further modification in January 1979 added facility maintenance at the VIC to TWAS' responsibilities. The landscaping function was previously performed by Expedient Services, Inc. (ESI), a non-union contractor. The maintenance was the responsibility of Boeing Services International (BSI); BSI employees were represented by Plaintiff union (Pet. App. 2a-3a).[1]

In early 1979, NASA invited competitive proposals for a new ten-year concession agreement at KSC. No wage

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1. "Pet. App." refers to the appropriate pages in the Appendix filed by the Petitioner.

determination issued on either modification or on the recompeted concession agreement;[2] however, the Union's primary focus in this litigation is on the failure of the government to issue wage determinations for the 1978 and 1979 modifications.

At the time TWAS assumed responsibility for landscape and facility maintenance, no ESI nor BSI employees were laid off as a result of the transition of responsibility, nor were any transferred from ESI or BSI to TWAS. TWAS performed the additional work with new hires. No individual was ever paid less money than he was being paid under any prior contractual arrangement (Pet. App. 32a).

IV.

CERTIORARI SHOULD NOT BE GRANTED FOR THE FOLLOWING REASONS

A. The Plaintiff Does Not Have Standing to Seek Damages

There are no allegations in the numerous pleadings filed by Petitioner that the Union itself was damaged. Instead, the Union's demand for monetary damages relates to the alleged right of certain TWAS employees to Service Contract Act wage determination wages. The Union does not allege that those damages were assigned to it nor that they were common to the entire membership and shared by all in equal degree. Under these circumstances, the Union is restricted to prospective relief—the precise

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2. Both the Petitioner and TWAS jointly sought a wage determination from the Department of Labor on the 1979 recompetition; however, they were not successful.

relief ordered by the district court.[3] *See Warth v. Seldin*, 422 U.S. 490 (1975); *United Steelworkers of America v. University of Alabama*, 599 F.2d 56 (5th Cir. 1979); *United States ex rel. United Brotherhood of Carpenters v. Woerfel Corp.*, 545 F.2d 1148 (8th Cir. 1976). Indeed, it is TWAS' position that the Union had no standing to appeal the district court's adverse decision on the damage claim and it remains the position of TWAS that the Union has no standing before this Court to have the remedy reviewed by certiorari.

B. The Conclusion That There Is No Private Right of Action Under the Service Contract Act Is Consistent With Other Circuit and District Court Decisions

The Eleventh Circuit specifically held that there was no private right of action under the Service Contract Act (Pet. App. 6a, 10a). Thus, the Eleventh Circuit joined the Ninth Circuit[4] and the District of Columbia Circuit[5] and numerous district courts[6] in concluding that there is

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3. This argument was not specifically addressed by the Court below. However, it is well settled that a respondent may raise before the Supreme Court any argument which supports the lower court decision in its favor. *See United States v. American Railway Express Co.*, 265 U.S. 425 (1924); *Walling v. General Industries Co.*, 330 U.S. 545 (1947).

4. *Miscellaneous Service Workers, Local 427 v. Philco Ford Corp.*, 661 F.2d 776 (9th Cir. 1981).

5. *International Association of Machinists and Aerospace Workers v. Hodgson*, 515 F.2d 373 (D.C.Cir. 1975).

6. *Service Employees International, Local No. 36 v. General Services Administration*, 443 F.Supp. 575 (E.D.Pa. 1977); *Dodd v. Blackstone Cleaners*, 61 Labor Cases (CCH) ¶32,281 (N.D.Tex. 1969); *Nichols v. Mower's News Service*, 492 F.Supp. 258 (D.C.Vt. 1980); *Foster v. Parker Transfer Company*, 528 F.Supp. 906 (W.D.Pa. 1981); *see also Berry v. Andrews*, 535 F.Supp. 1317 (M.D.Ala. 1982).

no private right of action under the Service Contract Act. There are no decisions to the contrary.

In an apparent attempt to overcome all judicial decisions to the contrary, the Petitioner has made numerous references to 29 C.F.R. §4.163(b), a rule which supposedly makes Section 353(c) of the Service Contract Act self-executing which then, according to Petitioner, creates a private right of action under the Service Contract Act. At pages 3 and 4 of the Petition, it is stated:

> Subsection (b) of §4.163, insofar as here pertinent, reads as follows:
>
> "(b) *Section 4(c) is self executing.* Under section 4(c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid * * *. *This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of wage determination based on the predecessor contractor's collective bargaining agreement.*" (Petitioner's Emphasis)

In a footnote at the bottom of page 4, the Petitioner notes that Section 4.163 was omitted for the first time in the revised version of the Regulations published July 1, 1983, effective January 27, 1984. While this is a technically accurate statement, what the Petitioner failed to make clear is that the above-quoted version of §4.163(b) was never more than a *proposed* regulation—proposed by the Department of Labor for public comment. It was not a part of the existing regulations. 29 C.F.R. §4.163 as it read at all times this action was pending in the lower courts is found at page A13 of the TWAS Appendix.

C. The Decision Below Does Not Call for the Court to Exercise Its Supervisory Power

As noted above, the *sine qua non* of the Petitioner's case—a private cause of action under the Service Contract Act—has now been found not to exist by three circuit courts and at least four district courts. Absent the existence of a private cause of action, the Petitioner cannot prevail. Yet the Petitioner argues, in effect, that the Court must invoke its supervisory power under Rule 17(a) of the Supreme Court Rules and create a private cause of action under the Service Contract Act, despite overwhelming authority to the contrary. Rule 17(a) suggests that, in the discretion of the Court, certiorari may be granted when a federal court of appeals:

> "has so far departed from accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."

The supervisory role of the Court is rarely invoked; when it has been exercised it is usually in criminal proceedings. *See Grunewald v. United States,* 353 U.S. 391 (1957); *Yates v. United States,* 356 U.S. 363 (1958); *Marshall v. United States,* 360 U.S. 310 (1959). Indeed, extensive research has not revealed a single instance where, in a case even remotely similar to the instant case, the Court's supervisory power was invoked. Certainly such power has not been exercised when three courts of appeal and numerous district courts have all reached the same conclusion on the underlying issue.

D. Congress Is Providing Constant Supervision Over Administrative and Judicial Interpretation of the Service Contract Act

Petitioners express concern that the Court should excise its supervisory powers to see that judicial and administrative decisions do not nullify the 1972 Amendments to the Service Contract Act. Respondent suggests that the supervision desired by Petitioner is being well provided by Congress. Indeed, since the adoption of the 1972 amendments, there have been numerous oversight hearings conducted by the Subcommittee on Labor Management Relations of the Committee on Education and Labor, United States House of Representatives. For example, the 1975-76 Oversight Hearings resulted in an amendment to the Service Contract Act to include white collar employees. That amendment was necessary in order to reverse an opinion of Judge George C. Young of the Middle District of Florida—the same Judge Young who authored the initial opinion in this case.[7]

The most recent oversight hearings were conducted on November 4, 5 and December 10, 1981. The Committee Report noted that the Committee had two specific goals in conducting the hearings:

> ". . . [t]he Subcommittee announced that it would conduct oversight hearings on the proposed regulations *as well as on the current enforcement of the Act.*"[8] (Emphasis Added)

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7. *Federal Electric Corp. v. Dunlop*, 419 F.Supp. 221 (D.C.Fla. 1976); see also *Descomp v. Samson*, 397 F.Supp. 254 (D.C.Del. 1974).

8. Report of the Subcommittee on Labor Management Relations of the Committee on Education and Labor, United States House of Representatives, 97th Cong., 2d Sess. 607 (1982). Pertinent portions of the Report are reproduced at pages A1 through A12 of the TWAS Appendix.

The Committee specifically included a section in its Report entitled "Enforcement of the Service Contract Act."[9] Presumably, the Committee was well aware of the numerous court decisions holding that there is no private cause of action under the Service Contract Act. The *Hodgson* decision had been on the books for six years; numerous district court decisions were then in existence; and the *Philco Ford* decision issued during the course of the 1981 oversight hearings. At least one other court decision[10] was specifically addressed by the Committee in 1981, and in the past, the Committee had proposed and Congress had enacted legislation to reverse district court decisions.[11] Accordingly, it is reasonable to assume the Committee knew of the numerous court decisions, holding that no private right of action existed.[12] In making specific recommendations for better enforcement of the Act, the Committee did not in any way suggest the creation of a private cause of action (TWAS App. A6-A11).

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9. TWAS App. A6-A11.

10. *Southern Packaging and Storage Co., Inc. v. United States*, 618 F.2d 1088 (4th Cir. 1980). TWAS App. A5-A6.

11. TWAS App. A4, A11.

12. As the Court noted in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353 (1982) at 379:

> "In Cannon v. University of Chicago, we observed that 'it is always appropriate to assume that our elected representatives, like other citizens, know the law.' 441 U.S. at 696-697. In considering whether Title IX of the Education Amendments of 1972 included an implied private cause of action for damages, we assumed that the legislators were familiar with judicial decisions construing comparable language in Title VII of the Civil Rights Act . . ."

E. The "Special and Important" Reasons to Grant Certiorari Do Not Exist Where the Issue Upon Which Certiorari Is Sought Is the Remedy

The District Court has already determined that the Visitor Information Center is not exempt from Service Contract Act coverage. Neither the government nor TWAS sought review of that issue on appeal.[13] Therefore, the only issue is the remedy. Both the district court and the circuit court felt that the equities of the case did not warrant retroactive back pay (Pet. App. 35a, 36a, 13a, 14a). The remedy issue is in actuality an argument among the parties that resulted from the unusual factual situation presented to the lower courts—a factual situation that is unlikely to arise again in view of the district court's holding that the Visitor Information Center is not exempt from the Service Contract Act—and the lower courts' views of the particular equities in the case. Accordingly, the issues simply are too narrow and not of sufficient importance to warrant the grant of certiorari.

F. Petitioner Has No Cause of Action Under 29 U.S.C. §301

Petitioner continues to maintain that Section 353(c) is self-executing and despite the undisputed finding of fact that TWAS did not agree to the retroactive inclusion[14] of any wage determination in its contract to a date prior to the date the Department of Labor established as the effective date of the wage determination, TWAS was re-

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13. TWAS filed a Cross Appeal on the coverage issue but then withdrew its appeal at the time it submitted its brief to the Eleventh Circuit.

14. Pet. App. 10a.

quired by law to ignore the DOL wage determination and instead adopt, as to the former jobs performed by BSI, the wage rates provided in the BSI-IAM labor agreement. The IAM's argument assumes the self-executing nature of Section 353(c)—no such finding has been made by the lower courts. However, even assuming that Section 353(c) is self-executing, *Jackson Transit Authority v. Local 1285 Division, Amalgamated Transit Union,* 457 U.S. 15 (1982), simply does not support the theory espoused by the Petitioner. *Jackson* involved the interpretation of Section 13(c) of the Urban Mass Transit Act. Section 13(c) requires as a condition of federal assistance, that the federal grant contract contain written protective agreements protecting the bargaining rights of unionized transit employees. There was no question but that Congress intended to create contractual rights in Section 13(c)—and the right to sue in the event either the protective agreement or the collective bargaining agreement was violated. As the Court specifically noted:

> "The issue, then, is not whether Congress intended the union to be able to bring contract actions for breaches of the two contracts (i.e., the 13(c) labor protective agreement and the collective bargaining agreement), but whether Congress intended such contract actions to set forth federal, rather than state, claims." 457 U.S. at 21.

Thus, as the Court noted, the private cause of action clearly exists under Section 13(c). The only issue before the Court was the appropriate forum to maintain the action. The portion of the opinion quoted by the Petitioner must be read in that context. *Jackson* does not support the concept that, when there is no private cause of action created by the federal statute in any forum, you can sue

under a collective bargaining agreement on the theory that a collective bargaining agreement, without the consent of the parties, incorporates the federal statute.

V.

CONCLUSION

This case has received the careful attention of two district court judges and the Eleventh Circuit Court of Appeals. The decisions of both the district court and the circuit court are consistent with that of all other courts who have decided the principal issue. Although the Petitioner presents it in many forms, the only remaining issue before the Supreme Court is the remedy—certainly not an issue that meets the requirements of Rule 17—that certiorari will be granted "only when there are special and important reasons therefor." Accordingly, review should be denied.

Dated: December 14, 1984

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James M. Blue, a member of the Bar of the Supreme Court of the United States and counsel of record for TWA Services, Inc., respondent, hereby certify that on December 19th, 1984, I served three copies of Brief in Opposition to Petition to Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, by depositing such copies in the United States Post Office, Tampa, Florida, with first class postage prepaid, properly addressed to the post office address of Mozart G. Ratner, the above-named petitioner's counsel of record, at 1900 M Street, N.W., Washington, D.C. 20036.

I further certify that service was made in like manner upon June W. Edwards, counsel for federal respondents, Office of the Solicitor General, Federal Programs Branch, Civil Division, Room 3335, U.S. Department of Justice, Washington, D.C. 20530. All parties required to be served have been served.

Dated: December 19th, 1984

JAMES M. BLUE
Counsel of Record for Respondent

TWA SERVICES
APPENDIX

APPENDIX A

97th Congress
2d Session } COMMITTEE PRINT

CONGRESSIONAL OVERSIGHT HEARINGS CONCERNING PROPOSED SERVICE CONTRACT ACT REGULATIONS

REPORT

OF THE

SUBCOMMITTEE ON LABOR-MANAGEMENT RELATIONS

OF THE

COMMITTEE ON EDUCATION AND LABOR

UNITED STATES

HOUSE OF REPRESENTATIVES

together with

MINORITY VIEWS

JULY 1, 1982

Printed for the use of the Committee on Education and Labor
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CONTENTS

[6] * * * ducted. The two-step procedure was rejected throughout the hearing as contrary to the SCA.[6]. Following the oversight hearings, the DOL withdrew that portion of the proposed regulations. Two of the withdrawn regulations—one dealing with 4(c) and the other with the definition of "locality"—are virtually identical to two of the 1981 proposed regulations.

Many of the problems addressed during the 1974 and 1975 hearings were occuring because the nature of the service contracting industry was changing and evolving. As stated above when the law was originally enacted in 1965, the Federal Government was primarily engaged in contracting services involving unskilled and semi-skilled workers. Most of these services were capable of being performed solely at the site of the government facility. For example, janitorial services at a military base can obviously be performed only at one place—the base itself. But as the industry changed and as the nature of the services being contracted out became more sophisticated, the procuring agencies and the Department of Labor, in some instances, advanced interpretations to cut back on the coverage of the Act. It was maintained that Congress had never intended protections for anything other than the most traditional service contract performed by the most traditional service worker such as the unskilled or semi-skilled janitor or gardener.

This view of limited coverage was explicitly rejected by the Subcommittee and the Congress both in 1972 and 1976. Congress clearly intended the protections and coverage of the law to advance along with the development of

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6. Oversight Hearings on the Service Contract Act of 1965, as amended before Subcommittee on Labor-Management Relations of the Committee on Education and Labor, pp. 7, 8, 28-30 (May 6, 7, 8, 1975).

the government service industry. The 1974-75 hearings, the 1975 report and the subsequent 1976 amendment to the Act were intended to make clear this policy.

The issue came to a head when coverage of the so called "white collar" worker was challenged. An erroneous district court decision was handed down which excluded certain white-collar workers from coverage of the Service Contract Act. In order to clarify its original intent with regard to coverage, Congress was obliged to enact the 1976 amendments to the Service Contract Act which made clear that all service contract workers were covered regardless of whether they were classified as "blue collar", "white collar", "unskilled", "semi-skilled", or "skilled". The 1976 amendments adopted the language of the Fair Labor Standards Act in excluding from coverage only persons "employed in a bona fide executive, administrative or professional capacity".

One final flurry of regulation occurred when on January, 1977, the Office of Federal Procurement Policy attempted, in effect to re-issue the abandoned 1975 regulations. The policy was withdrawn shortly thereafter.

II. The 1981 Oversight Hearing; Findings and Conclusions

On August 14, 1981, the Department of Labor issued for comment proposed regulations pursuant to the Service Contract Act. Soon thereafter, the Subcommittee announced that it would conduct oversight hearings on the proposed regulations as well as on the current [7] enforcement of the Act. The Subcommittee conducted three days of hearings on November 4 and 5, 1981 and December 10, 1981. The Subcommittee heard testimony from the Department of Labor, service contract workers, service con-

tractors, and interested labor organizations and trade associations. Based upon the extensive testimony and large body of supporting information which was received, the Subcommittee has reached the following findings and conclusions.

* * *

C. THE PROPOSED DEFINITION OF "LOCALITY"

The proposed regulations have resurrected a definition of "locality" which has been rejected time and again by the Subcommittee as contrary to the purposes of the Act. Once again the Department proposes the so-called "two-step" bidding procedure. Under the procedure, when the place of performance is unknown at the time of bidding, a separate wage determination would be issued for each of the potential places of performance of the contract after potential bidders are identified. Bidders would make their bids, on the basis of wage determination in the ultimate place of performance. While this interpretation may have some surface appeal, it would simply channel service contracts into low wage areas, create turn-over and labor-management instability and depress service contract wages. The testimony provided by the Department demonstrates that this is precisely what will occur. (See pages 697-698, December 10, 1981).

The legislative history cited above makes clear that "locality" is to be pegged to one place and may never be the ultimate place of performance (supra. pp. .....). The only justification offered by the Department in defense of its "two-step" procedure is *Southern Packaging and Storage Co. Inc. v. United States,* 618 F.2d 1088 (4th Cir. 1980). The Subcommittee does not read *Southern Packaging* as mandating the "two-step" procedure. *Southern Packaging* concerned the performance of a contract to assemble the

component parts of "C" rations for the army by Southern Packaging, a contractor * * *.

* * *

III. ENFORCEMENT OF THE SERVICE CONTRACT ACT

Enforcement and adequate administration of the Service Contract Act has been and continues to be a problem. The Preliminary Regulatory Impact Analysis itself admits that there is an "average one-year lag in adjusting SCA determinations for changes in local wages,"[14] Added to this administrative problem affecting every service contract worker is the persistent problem of certain procuring agencies refusing to comply with the terms of the Act. Workers, union representatives and contractors all provided testimony which indicates that the enforcement difficulties under the Act continue. One contractor, Brink's Inc., which provides armoured car services to the Federal [33] Reserve Board testified to the Board's persistent refusal to abide by the terms of the SCA:

> DONALD PAYNE. In our view, the Department's reexamination of its regulations on labor standards for Federal Service Contracts is seriously deficient in failing to consider the continuing evasions by the Federal Reserve System of the purposes of the law * * *
>
> Because the Service Contract Act has not been effectively enforced and, therefore, the purposes of Congress in passing the Act have not been achieved, Brink's is under a severe competitive handicap in bidding for government business, and, in particular

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14. Otter Letter, p. 723.

the transportation of coin and currency for the Federal Reserve System * * *

* * * As a result of the Department of Labor's refusal to enforce compliance, the Service Contract Act is being circumvented by the Federal Reserve System. The Department of Labor could mitigate the damage its refusal continues to cause by issuing a regulation requiring any contractor to inform the Department of Labor, within 30 days of the commencement of its contract, of the wages and fringe benefits it is paying its employees. As matters now stand, no one is monitoring compliance by Government contractors with the requirements of the statute that the contractor pay not less than the prevailing or predecessor wages and fringe benefits. (November 4, 1981, pp. 251-252).

Representatives of service workers also described the difficulties they encountered from procuring agencies unwilling to enforce the Act as well as the problem of recovering back-wages from contractors once violations are documented:

JOHN CURRAN. Mr. Chairman, one of the unfortunate aspects of proposed regulations such as these is that they successfully turn the public's attention from the very real issues which do, in fact, exist under the law.

I am referring to the issues of enforcement which you have placed on the agenda of this hearing. Enforcement has always been and continues to be a grave problem in this industry.

The front-line of insuring that the proper wage determinations are included in Federal service contracts is in the procuring agencies themselves because

it is they who must initially notify the DOL that a service contract is to be let.

Some procuring agencies are conscientious but others, unfortunately, simply oppose this law and do not carry out their duties under the Act.

Indeed, the failure of certain contracting agencies to enforce the Act has been documented by the General Accounting Office in its report entitled, Review of Compliance with Labor Standards for Service Contracts by Defense and Labor Departments issued by the GAO in January 1978.

The GAO found serious deficiencies in the administration of the Act by the Air Force, the Army, and the Navy. The GAO documented numerous instances of contracting agencies [34] failing to request wage determinations from the DOL; obtaining wage determinations, and then failing to include them in the service contracts; failing to request wage determinations during the required 30-day period prior to the solicitation; and failing to notify the Department of Labor of the existence of collective bargaining agreements.

The GAO also found that oftentimes when violations of the Act were discovered, many of the workers entitled to receive back wages failed to actually receive back wages failed to actually receive those wages.

For example, it found in the years 1974 and 1976 that 29 percent and 34 percent, respectively, of the back wages due workers were never restored to those workers.

Within our own union, we are continually frustrated by the inability to obtain adequate enforce-

ment of the SCA. Moreover, when violations are uncovered, the ability to actually place back wages and fringe benefits into the pockets of the workers who have earned them is limited indeed. . . .

If there is to be any real enforcement under this law, the DOL must allocate the personnel and manpower needed to immediately investigate violations and obtain back pay while the contract funds still exist from which meaningful recovery can be made.

We have previously appeared before this subcommittee and have testified that one relatively easy mechanism to help achieve recovery of back wages and fringe benefits is the requirement of performance bonds.

If required, it would encourage stability in the industry by tending to ensure that only reputable contractors are awarded service contracts. (November 5, 1981, pp. 340-342).

Several of the proposed regulations will exacerbate rather than alleviate the enforcement problems described above. One proposal will limit the liability of prime contractors for violations of the SCA by subcontractors. An adequate explanation for these proposals has not been offered by the Department of Labor as the following colloquy demonstrates:

COUNSEL. Under existing regulations, a prime contractor has been liable for violations of the SCA committed by a subcontractor. It was felt that such a liability served as a strong incentive for the prime contractor to deal with reputable subcontractors and ensure they obeyed the law. Your proposal would limit that liability to those situations "appropriate under the circumstances of the case."

Would you provide us with an example of a situation where it was not appropriate under the circumstances of the case?

MR. OTTER. I will ask Dorothy for that.

MRS. COME. I am trying to think of a situation that might be more clarifying for you. In general it is not a—there is not an attempt, as I understand the policy, to withdraw unless there is a unique situation where the prime had all sorts of [35] evidence that the—or thought he had all sorts of evidence that the subs were in fact going along with it, and following the wage terms, proper classifications, et cetera, and had been totally misled by some kind of falsification on the part of a subcontractor that was almost impossible to detect on a regular basis. Or if the agency misled the prime, who then did not—or contracting agency did not thoroughly educate the prime who then did not educate the sub.

Those are the ones that I can think of offhand. I think it was simply an escape clause, as I understand the policy, for an unusual circumstance where you might find that a prime contractor really was not responsible, later exercising diligence and due care, for something that the subcontractor did.

COUNSEL. Why has the provision in regulations incorporating the Service Contract Act and applicable regulations by reference into service contracts been dropped?

MRS. COME. That was a policy decision which the staff was asked to incorporate.

COUNSEL. Do you have a justification?

MR. OTTER. I am not prepared at this time to give an explanation, no, sir.

COUNSEL. Perhaps, as clarification, does it mean that the contractor who violates the act will not have violated the provisions of the contract as well?

MR. OTTER. I do not visualize that. (December 10, 1981, pp. 717-718)

It is clear that the Department of Labor must allocate more of its resources to the enforcement of the Service Contract Act. It must ensure that wage and fringe benefit determinations in fact reflect the *current* prevailing rate rather than the rate as some point in the past. The Department should seriously consider bonding and stricter reporting requirements as suggested by some witnesses. Perhaps most importantly, staffing and budget decisions should reflect that enforcement and proper administration of the SCA are priorities of the Department of Labor.

* * *

(From Minority Report)

[54] Finally, there is this colloquy between Messrs. Thompson and Ashbrook, both supporters of the amendments:

MR. ASHBROOK. To confirm the points made in the committee report (94-1571), the bill and the report simply state that our disagreement with the *Descomp* and *Federal Electric* court decisions is to the extent that those decisions adopted a rule which *per se excluded* the so-called white collar worker from coverage.

Is that the gentleman's understanding?

MR. THOMPSON. Mr. Speaker, if the gentleman will yield, that is exactly correct.

MR. ASHBROOK. Then, Mr. Speaker, *it is the per se exclusion* of such white collar workers that amounts to the "narrow construction" referred to in the report—page 2?

MR. THOMPSON. Mr. Speaker, the gentleman, surprisingly, is correct once more.

MR. ASHBROOK. Mr. Speaker, perhaps I had better not go any further because that is a slightly better average than I usually have, but I will take a chance and ask a third question.

Mr. Speaker, the amendments to sections 2 and 8 of the act are not to eliminate the definition of "service employee" but to make clear that white collar workers *might also be* service employees, and such an employee is a person who is actually engaged in the performance of the service contract?

Is that the gentleman's understanding?

MR. THOMPSON. Mr. Speaker, amazingly the gentleman is exactly correct for the third time (emphasis added) [*Congressional Record—House,* September 21, 1976, p. 3157.]

APPENDIX B

§ 4.163 Locality basis of wage and fringe benefit determinations.

Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine what minimum monetary wages and fringe benefits are prevailing for various classes of service employees "in the locality." The term "locality" has reference to geographic space. However, it has an elastic and variable meaning and, if the statutory purposes are to be achieved, must be viewed in the light of the existing wage structures which are pertinent to the employment by potential contractors of particular classes of service employees on the kinds of service contracts which must be considered, which are extremely varied. It is, accordingly, not possible to devise any precise single formula which would define the exact geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Each such determination applies only to contracts for the locality which it includes.